92-930

Supreme Court, U.S.
FILED
NOV 30 1992
OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ROBERT ERLE QUIGLEY,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

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November 30, 1992

Washington, D.C. • THIEL PRESS • (202) 328-3288

32 pp

QUESTION PRESENTED

Whether a mistrial should have been granted after the State's law enforcement witness testified that he was unable to get a statement from Petitioner, thereby violating Petitioner's Fifth and Fourteenth Amendment rights, where the evidence of guilt was marginal and there is reasonable doubt that Petitioner would have been convicted in the absence of such improper testimony; and whether the failure to grant a mistrial in such circumstances denied Petitioner a fair and impartial trial as guaranteed by the Sixth and Fourteenth Amendments.

PARTIES TO THE PROCEEDING

1. Robert Erle Quigley, Petitioner.
2. The State of Florida.

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COMES NOW, Robert Erle Quigley, Petitioner, and submits this Petition for Writ of Certiorari requesting that the Supreme Court grant a Writ of Certiorari, and reverse and remand the case to the District Court of Appeal, First District of Florida, with instructions to set aside the judgment and sentence of Petitioner and grant such other relief as it may deem appropriate.

PROCEEDINGS BELOW

The Circuit Court of the First Judicial Circuit, in and for Escambia County, Florida, rendered its judgment and sentence of Petitioner. Appendix J at 25a; and Appendix K at 28a. The District Court of Appeal, First District of Florida, rendered its *per curiam* affirmance on June 3, 1992, and rendered its order denying a timely filed motion for rehearing on July 14, 1992. Appendix A at 1a; Appendix B at 2a. These decisions are not reported at this time.

STATEMENT OF JURISDICTION

This Court has jurisdiction of this Petition for Writ of Certiorari pursuant to 28 U.S.C. sec. 1257. The *per curiam* affirmance of the trial court which was rendered by the District Court of Appeal, First District of Florida, on June 3, 1992, and its July 14, 1992, denial of rehearing were final judgments or decrees rendered by the highest court in Florida in which a decision could be had.

The underlying question presented is whether the opinion of the District Court of Appeal, First District of Florida, in affirming the refusal of the trial court to grant a mistrial contravenes the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND RULES OF COURT

The Fifth Amendment to the Constitution of the United States:

> No persons . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law . . . .

The Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

Fourteenth Amendment to the Constitution of the United States, Sec. 1:

> . . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

Constitution of the State of Florida, Article 5, Sec. (3)(b):

> JURISDICTION – The supreme court
>
> * * *
>
> (3) May review any decision of a district court of appeal . . . that expressly construes a provision of the state or federal constitution . . . or that expressly and directly conflicts with a decision of another district court of appeal or the supreme court on the same question of law.

Florida Rules of Appellate Procedure, Rule 9.030(a)(2):

> **Discretionary Jurisdiction.** The discretionary jurisdiction of the Supreme Court may be sought to review:
>
> (A) decisions of district courts of appeal that:
>
> * * *
>
> (ii) expressly construe a provision of the state or federal constitution.
>
> * * *

(iv) expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law;

* * *

STATEMENT OF THE CASE

On December 20, 1990, the State Attorney for the First Circuit of Florida filed an information against the Petitioner charging him with three counts of criminal activity: Count One, DUI-DUBAL Manslaughter; Count Two, Vehicular Homicide; and Count Three, DUI-DUBAL Damage To Person. Appendix D.

At Petitioner's trial on these charges, Florida Highway Patrol Homicide Investigator Steven R. Bevis testified for the State. During his cross examination, Bevis was being questioned about his investigative methods and conclusions. Specifically, part of the basis for Bevis' decision that the Petitioner was impaired was his assumption that Petitioner had not been able to stop his vehicle soon enough. In this regard, the following colloquy took place:

> Q. Now, you also say that you based your decision that Mr. Quigley was impaired on the distance it took to stop the truck and park, stop the truck, assuming that it stopped where it was parked from the point of impact up here to where you have marked on the exhibit, on this exhibit, I think you have said this was 170 feet?
>
> A. Yes, sir.
>
> Q. And you made your determination that he didn't attempt to stop, it took him this period of time to stop and, therefore, it's an excessive distance to stop, didn't you?

A. Yes, sir.

Q. Now, do you know – did you know then whether Mr. Quigley had attempted to stop the truck or did stop the truck prior to where Mr. Hawley came to rest?

A. No, sir.

Q. Did you attempt to make any determination in that regard?

A. I was not able to get a statement from Mr. Quigley. Appendix P at 107a.

Following this testimony, the jury was removed, and trial counsel for Petitioner asked for a mistrial on the basis that investigator Bevis' testimony was "evidence to the jury regarding his right to remain silent". Appendix P at 108a.

After a brief recess of the proceedings, the trial court determined that Petitioner's trial counsel had not invited investigator Bevis' response, and that the response was a comment on the Petitioner's right to remain silent. Appendix C at 3a; Appendix P at 109a.

The trial court took under advisement the request for a mistrial, and discussed with the prosecuting attorney and the Petitioner's trial counsel the issues of whether to give a curative instruction, and if so, the nature of such an instruction. Appendix C at 3a, 4a, 5a; Appendix P at 110a,111a.

Petitioner's attorney did not believe that a curative instruction would adequately protect the Petitioner, and he therefore continued to ask for a mistrial. He also objected to any curative instruction proposed by the State. Appendix C at 4a, 5a; Appendix P at 110a,111a.

The prosecuting attorney took the position that the curative instruction should not contain any explanation as to why the jury should disregard investigator Bevis' testimony because he believed it would "just draw attention to it". Appendix C at 4a, 5a; Appendix P at 111a.

Ultimately the trial court gave the jury the following instruction:

> . . . . Immediately before the recess during the examination of this particular witness, the witness made a comment in the – and the last comment the witness made I specifically ask you to disregard it, do not consider that comment in any way in your deliberations, strike it from your consideration completely. Thank you. Appendix C at 5a; Appendix P at 111a, 112a.

The motion for mistrial was taken under advisement throughout the proceedings.

Following the trial, Petitioner's counsel filed a written MOTION FOR MISTRIAL alleging that Bevis' testimony was highly prejudicial to the Petitioner because it was a comment by a police officer on the Petitioner's constitutional right to remain silent and prevented the Petitioner from receiving a fair and impartial trial. Appendix F.

The trial judge indicated his denial of Petitioner's request for mistrial on May 28, 1991, at the margin of the MOTION FOR MISTRIAL. Appendix F.

The Petitioner was granted a Judgment of Acquittal on Count Two, Vehicular Homicide, because there was no evidence that Petitioner operated his vehicle in any type of reckless manner. The granting of this judgment of acquittal is indicated at the margin of the Petitioner's MOTION FOR JUDGMENT OF ACQUITTAL. Appendix

H at 20a. This judgment of acquittal was granted after the jury had returned a guilty verdict on this charge although the State had failed to establish a *prima facie* case.

The jury also found the Petitioner guilty of Count One (DUI-DUBAL Manslaughter) and Count Three (DUI-DUBAL Damage to Person). Appendix J at 25a. As to Count One, Petitioner was sentenced to a prison term of twelve years, the balance of said term to be suspended after serving five years imprisonment. A five year probation period is to follow such imprisonment. Appendix K at 28a. As to Count Three, Petitioner was placed on probation for a period of five years, the said five years to run concurrent with his sentence under Count One. Appendix J at 26a.

Petitioner filed his NOTICE OF APPEAL to the District Court of Appeal, First District of Florida, on June 4, 1991. Appendix L.

He thereafter timely filed and served APPELLANT'S INITIAL BRIEF setting forth four appellate points, the fourth of which concerned the above-discussed testimony of investigator Bevis:

> THE COURT ERRED IN FAILING TO DIRECT A MISTRIAL IN VIEW OF THE ARRESTING OFFICER'S STATEMENT ON CROSS-EXAMINATION THAT "I WAS NOT ABLE TO GET A STATEMENT FROM MR. QUIGLEY". Appendix M at 33a, 57a.

The District Court of Appeal rendered its *per curiam* affirmance on June 3, 1992. Appendix A. It denied Petitioner's timely-filed motion for rehearing on July 14, 1992. Appendix B.

Following the decision of the District Court of Appeal, the trial court entered an ORDER STAYING EXECUTION OF SENTENCE, SETTING BAIL, AND CONTINUING PRESENT BOND which stayed the execution of sentence until this Court finally adjudicates this proceeding. Appendix N at 65a.

By order of Justice Kennedy, the time for filing this Petition for Writ of Certiorari was extended to and includes November 30, 1992. Appendix O at 67a.

As the opinion of the District Court of Appeal indicates (Appendix A at 1a) the appellate court gave no reasons for its decision and provided no legal analysis of the issues raised by Petitioner. Under Florida law, Petitioner had no further avenue of direct review in the courts of Florida.

Under the circumstances of this case, there would have been the possibility of discretionary review by the Florida Supreme Court only if the District Court of Appeal had *expressly* construed a provision of the state or federal constitution, or if it had rendered a decision which *expressly* and directly conflicted with the decision of another District Court of Appeal or of the Florida Supreme Court on the same question of law. Art. 5, Sec. 3(b)(3), Constitution of the State of Florida; Rule 9.030-(a)(2)(A)(ii) and (iv), Florida Rules of Appellate Procedure. Thus, the only direct review available to the Petitioner is a writ of certiorari from this Court to the District Court of Appeal.

Since the opinion of the Court below reveals no facts involved in this case, it is necessary to include in the appendix to this petition pertinent excerpts from the transcript of the testimony at trial.

The charges against Petitioner arose from the death of Harry James Hawley and the injury of his wife, Anita F. Hawley. Appendix D at 6a, 7a.

Anita Hawley testified at the trial that she and her husband were walking in an easterly direction along Fort Pickens Road at the time of the accident. It was getting "darker and darker", and the cars had their headlights on. Mrs. Hawley acknowledged that she and her husband were walking on the wrong side of the road with their backs to the traffic. They were both barefoot, and she walked on the sand immediately next to the road while her husband was "walking on the concrete". Appendix P at 71a, 72a and 73a.

She also admitted that she had expressed concern to her husband about walking with their backs to the traffic, and that this made her very nervous causing her to be "constantly looking back". Appendix P at 73a.

According to her testimony, at least four cars passed them, but she does not remember any of the cars flicking their headlights at them. She said that Mr. Hawley was not paying any attention, and that she had pulled him off the highway when three cars came by. Appendix P at 74a.

Before and at the time of the accident Mrs. Hawley was drinking. Appendix P at 68a, 77a. It was totally dark at this point. Appendix P at 75a.

At impact Mr. Hawley was still on the road. Appendix P at 78a. Mrs. Hawley was holding her drink in her right hand, and she was holding her husband's hand with her left hand. The truck's impact caused her to have bruises in her shoulder, shoulder area of her back, upper left hip, and forearm. She also suffered a sprained ankle.

However, she did not sustain any cuts. Appendix P at 77a.

After she was knocked down to the ground, she jumped up and ran looking for her husband. At this point, she indicated that she saw the pickup truck that had hit her and her husband, and that it had pulled into the lane of oncoming traffic. Appendix P at 78a. After she saw the pickup truck stopped in the oncoming traffic lane, she said that

> It pulled back over on the right, because there was a car meeting – oncoming there, and he pulled off to the right of the roadside. Appendix P at 79a.

Mary Ann Irvin is a motorist who saw Mr. & Mrs. Hawley walking on Fort Pickens Road shortly prior to the accident. When she saw them, they were walking in the roadway in her lane of traffic. Appendix P at 80a. Mr. Hawley was apparently near the center of Ms. Irvin's lane of traffic, and Mrs. Hawley was near the white line on the edge of the road. Appendix P at 81a.

According to Ms. Irvin, it was very dark in this area of Fort Pickens Road, a two-lane road, and oncoming traffic at night

> . . . hinders your distance of visibility in front of you, because if you look at the lights, it totally blinds you . . . Appendix P at 82a, 83a.

Ms. Irvin flashed her lights at them, but they did not move although there was nothing between her car and the Hawleys that would have prevented them from seeing her lights flashing. Appendix P at 83a, 84a. This upset Ms. Irvin because they weren't observing the laws by walking on the wrong side of the road, and she knew that

the situation was an accident waiting to happen. Appendix P at 84a.

Another witness, Terry Yvonne Schulze, was driving westwardly in a vehicle meeting Petitioner's vehicle. She witnessed the accident. Appendix P at 90a, 91a.

Ms. Schulze pulled over to the side of the road just west of where Mr. Hawley was lying. She got out of the car and went over to Mrs. Hawley, who was at her husband's body. Mrs. Hawley smelled strongly of alcohol. Appendix P at 89a.

At this time, Ms. Schulze saw another vehicle parked about fifty feet *west* of where Mr. Hawley's body was lying. She believes that this vehicle "pulled around" the scene of the accident and parked. She saw no other eastbound vehicles on Fort Pickens Road at that time. Appendix P at 90a, 91a.

Ursula Smith is another witness and motorist who saw Mr. & Mrs. Hawley walking in the eastbound lane of Fort Pickens Road at a time shortly before the accident. This upset Ms. Smith because it appeared to be so dangerous and because there was a walking path easily accessible to the Hawleys. Appendix P at 86a.

Shortly after the accident, Ms. Smith saw Petitioner running from his nearby townhouse back to the scene of the accident. She stayed at the scene at Petitioner's request because he wanted her to tell the police officers what she had seen. Appendix P at 85a, 86a. She testified that there was nothing to indicate that Petitioner was impaired at that time. Appendix P at 88a.

Ursula Smith's husband, Robert Daniel Smith, had the opportunity to observe the Petitioner for about ten to twenty minutes immediately following the accident.

Appendix P at 97a. Mr. Smith did not notice anything about the Petitioner's talk or actions that would suggest that he was under the influence of alcohol. Appendix P at 97a, 98a.

Joseph Simmons was with the Petitioner for approximately thirty minutes or longer at the accident scene. He testified that the Petitioner appeared to be "perfectly sober". Appendix P at 98a, 99a.

Escambia County Deputy Sheriff Roger Grice was one of two officers first on the scene of the accident. Appendix P at 101a. When he first arrived, Mrs. Hawley was hanging on to her husband. Deputy Grice could smell alcohol on her and was of the opinion that she was under the influence. Appendix P at 100a.

Although Deputy Grice was not close to the Petitioner, he did observe the Petitioner standing in front of his truck, and he saw nothing that would indicate that Petitioner was unsteady on his feet. He had no reason to believe that Petitioner was under the influence of alcohol. Appendix P at 100a, 101a.

Florida Highway Patrol Trooper William C. Smith was another law enforcement officer at the scene of the accident. He indicated that he conversed with the Petitioner at the scene and that he had walked with Petitioner. He indicated that there was nothing in his contact with Petitioner that would suggest to him that Petitioner's faculties were impaired. Appendix P at 92a, 93a.

However, Trooper Smith said that after driving Petitioner to the hospital and back, he "had a hunch" that Petitioner would go over the legal limit due to his breath. Appendix P at 93a, 94a.

Theresa Lynn White saw Petitioner shortly after the accident. Appendix P at 123a, 124a, 125a. She saw him

when he went to call the emergency 911 number and when she went over to the scene of the accident to stay with him until the law enforcement officers left with him. She did not see anything about his walk, talk, the way he stood or how he handled himself which would indicate that he was under the influence of alcoholic beverages. Appendix P at 123a, 124a.

William Allen Morphew saw Petitioner both shortly before the accident and when Petitioner came in to call 911. Morphew talked to Petitioner at his apartment and when he took him to pick up his truck. He did not notice anything that indicated Petitioner was under the influence of any substance. Appendix P at 124a, 125a.

Jean Bell, the Gulf Breeze Hospital medical technologist, was the individual responsible for taking the blood from Petitioner which was intended to be used in the blood alcohol test. She testified that she drew three vials or tubes of blood from the Petitioner, but she did not herself actually place any marks on the tubes. According to her, the Petitioner's blood samples were placed in two tubes with *yellow* tops and in one tube with a *purple* top. Appendix P at 94a.

Ms. Bell saw the Petitioner walking around in the laboratory. She also observed his conversation.

She stated that Petitioner requested that a doctor take his blood, but that he allowed her to take the blood when the trooper told him that he had no choice in the matter. She was close to the Petitioner, right at his arm, when she drew the blood from him.

Nevertheless, she did not observe anything that led her to believe that Petitioner's faculties were impaired or that he was under the influence of alcohol. Appendix P at 95a, 96a.

Hal Easter is the Florida Department of Law Enforcement Crime Laboratory supervisor who testified in regard to the blood samples which he tested for alcohol content. Mr. Easter indicated that he received two tubes of blood, not three as Jean Bell had testified. He also indicated that the stoppers on these two tubes were gray, not yellow and purple. Appendix P at 119a, 120a.

The blood which he tested indicated a blood alcohol level of .19 grams of ethyl alcohol per 100 milliliters, also known as a .19 percent blood alcohol level. Appendix P at 120a.

One of the State's most important witnesses was Florida Highway Patrol Homicide Investigator, Trooper Steven R. Bevis.

Trooper Bevis was the only witness other than Trooper Smith who smelled alcohol on Petitioner's breath. Appendix P at 101a. He said that he "detected a slight unsteadiness" when he saw Petitioner walking, but that there were no other "terribly noticable" signs of intoxication. Appendix P at 102a.

He also testified that the manner in which the accident occurred gave him a "very strong indication" that Petitioner was impaired:

> Q. Would you tell the jury everything that went into that decision on your part.
>
> A. First, both pedestrians were dressed in white. Secondly, at least two other drivers had observed them in the roadway and had been able to avoid them. Third, there was no evidence of any attempt to stop or avoid striking the pedestrians. And four, the distance between the point of collision and the distance to the final rest distance of 170 feet in the 30-mile-an-hour speed zone did not

indicate any kind of rapid reflexes or quick reflexes or attempt to stop. Appendix P at 102a.

However, Bevis indicated that he consulted with the State Attorney's Office before he filed the charges in the case because he had questions regarding two contributing causes of the accident: (a) Mr. and Mrs. Hawley's violation of the law by walking on the roadway with their backs to the traffic, and (b) the darkness or low light condition at the accident scene. Appendix P at 103a.

As related above, an important consideration in the mind of Trooper Bevis for the determination of whether Petitioner was impaired was that there was no evidence of any attempt to stop or avoid striking the pedestrians. The evidence he looked for were tire marks where Petitioner might have attempted to stop, alter his direction, or leave the roadway. He found no such tire marks. Appendix P at 104a.

However, Bevis did not determine if Petitioner's truck had an anti-locking brake system. He acknowledged that he did not know what such a brake system looks like but that he did know they prevent tires from skidding. Appendix P at 104a. He had no training in anti-lock brakes, although he had training in braking systems. Appendix P at 105a.

He also admitted that it was important to a traffic accident investigation to know whether a vehicle will make skid marks. However, he did not attempt to conduct such a test on Petitioner's vehicle or any other similar vehicle. At the time of trial, he did not know whether the subject truck would leave skid marks during sudden stopping. Appendix P at 106a.

Another important consideration in Trooper Bevis' opinion was the distance between the point of collision and where he found Petitioner's vehicle parked. Appen-

dix P at 107a. This distance led Bevis to believe that Petitioner took too long a period of time to stop. Appendix P at 107a.

It was during this questioning of Bevis' methods of investigation and conclusions that he made the comment about not being able to get a statement from Petitioner. Appendix P at 107a.

After the recess devoted to the issues raised by Trooper Bevis' comment and defense counsel's motion for mistrial, Bevis admitted that he made no attempt to determine whether Petitioner had stopped his vehicle "prior to the spot where Mr. Hawley came to rest". Appendix P at 112a. However he acknowledged that this would be a significant factor in determining whether Petitioner was impaired or under the influence at the time of the accident. Appendix 114a, 115a.

He also affirmed that oncoming traffic would be an important factor in determining whether Petitioner's reactions were appropriate. Appendix P at 114a. But the record does not indicate that he considered this factor in reaching his conclusions.

He said that the speed of Petitioner's vehicle was not involved in the accident and had no bearing on his opinion that Petitioner was impaired. Appendix P at 112a.

He did not give Petitioner the standard roadside test for alcohol impairment, although he was aware of the seriousness of the criminal charges that might be brought against Petitioner and although Trooper Smith could have assisted by conducting such a physical test on Petitioner. Appendix P at 116a, 117a, 118a, 119a.

He acknowledged that normally someone is videotaped when there is a question about their impairment or intoxication. However, Bevis did not have Petitioner videotaped. Appendix P at 119a.

James D. Anderson, a State consulting forensic engineer, testified that he ran tests on Petitioner's truck and found that it left no skid marks when making emergency-type stops at 35, 40 and 45 miles per hour. Appendix P at 121a.

Mr. Anderson summarized his expert opinion as follows:

> It is my opinion that Mr. Quigley was going down this road in a speed which exceeds the speed limit out tnere on the beach and that he had ample and sufficient time and distance to avoid it – hitting Mr. Hawley. Appendix P at 121a.

Mr. Anderson's opinion contrasts with the opinion of Trooper Bevis that speed had no bearing on the accident. Appendix P at 112a.

Mr. Anderson's opinion is also contradicted by the opinion of the Petitioner's accident reconstruction specialist, Bobby Vincent Smith. Mr. Smith believed that the Petitioner had reacted quickly and had come to a stop before reaching Mr. Hawley's body, and then pulled around the body. Appendix P at 122a. He pointed out that it was very difficult to see people at night when you are facing oncoming traffic, and that such oncoming traffic blocked the left lane of the highway so that the Petitioner could not go around the pedestrians. Appendix P at 122a.

Petitioner did not testify at the trial. Other than statements acknowledging driving the vehicle, no incriminating statements of Petitioner were admitted in evidence.

REASONS WHY THE WRIT SHOULD BE GRANTED

The Fifth Amendment protection precluding comment on a Defendant's failure to give a statement is most important in cases such as this one where the evidence of guilt is marginal at best, and where there is a strong indication that the jury was prejudiced against the Petitioner.

Although there are decisions of the Supreme Court of Florida indicating conflict with the failure of the trial court to grant a mistrial in this case, no direct State review of the District Court of Appeal's *per curiam* decision is permitted under the jurisdictional strictures of the Florida Constitution. That constitution requires that a Florida district court of appeal decision *expressly* and directly construe a provision of the federal constitution, or *expressly* and directly conflict with a decision of another Florida appellate court, in order to open the avenue for discretionary review by the Florida Supreme Court. Fla. Const., Art. 5, Sec. (3)(b).

The decision below conflicts with the rules set forth by this Court in *Chapman v. State of California,* 87 S.Ct. 824 (1967), and its progeny. If cases of this type are not reviewed by this Court, it will allow the district courts of appeal in Florida to avoid or ignore important but difficult federal constitutional questions without threat of further direct review. Stated differently, in the absence of review by this Court, Florida district courts of appeal will be able to effectively preclude review by either the highest court in Florida or by this Court if they refuse to express reasons for decisions on important federal constitutional questions. This will undermine public confidence that there is an effective remedy for federal constitutional violations in the trial courts of Florida.

These are compelling reasons for this Court's exercise of its discretionary review jurisdiction.

ARGUMENT

A MISTRIAL SHOULD HAVE BEEN GRANTED AFTER THE STATE'S LAW ENFORCEMENT WITNESS TESTIFIED THAT HE WAS UNABLE TO GET A STATEMENT FROM PETITIONER, THEREBY VIOLATING PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS, WHERE THE EVIDENCE OF GUILT WAS MARGINAL AND THERE IS REASONABLE DOUBT THAT PETITIONER WOULD HAVE BEEN CONVICTED IN THE ABSENCE OF SUCH IMPROPER TESTIMONY; AND THE TRIAL COURT'S FAILURE TO GRANT A MISTRIAL IN SUCH CIRCUMSTANCES DENIED PETITIONER A FAIR AND IMPARTIAL TRIAL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS.

The preliminary issue is whether Davis' comment that he "was not able to get a statement from Mr. Quigley" is an impermissible comment on Petitioner's right to remain silent. As has been indicated, the trial court determined that the testimony was indeed such a comment.

Much weight should be given to this finding. However, candor requires that Petitioner point out that the court utilized the "fairly susceptible" Florida test in making that determination.

The Florida rule is simply that a statement which is fairly susceptible of being interpreted by the jury as a comment on the accused's failure to give a statement or testify is to be treated as constitutionally prohibited. *State v. Kinchen,* 490 So.2d 21 (Fla. 1985); *State v. Thornton,* 491 So.2d 1143 (Fla. 1986).

What has been called the federal test in such matters was stated at *Samuels v. United States*, 398 F.2d 964, 968 (5th Cir. 1968), *cert. denied*, 393 U.S. 1021, 89 S.Ct. 630, 21 L.Ed.2d 566 (1969): the test in determining whether such a transgression has occurred is whether the remark was manifestly intended or was "of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify".

Under the circumstances of this case, the testimony or comment of Trooper Bevis meets both the Florida "fairly susceptible" test and the federal test. Petitioner was present and physically able to give a statement to Bevis. This trooper and many other witnesses indicated that the Petitioner was at the scene for a substantial period of time after the accident, and that he accompanied law enforcement to the hospital for a blood test and then returned to the scene. Hence, the testimony that Bevis "was not able to get a statement from Mr. Quigley" would naturally and necessarily be taken by the jury to be a comment on Petitioner's silence or refusal to give a statement.

Since this comment or testimony of the law enforcement officer came during defense counsel's cross-examination, the next issue to be resolved is whether the attorney invited the prohibited testimony.

The trial court determined that Bevis' response was not invited by defense counsel. The written record supports this finding, and the trial judge was best able to evaluate the nature, tenor and tone of the questioning and responses. His factual findings should be given due deference.

It should be noted that the federal test does not require a showing that Bevis specifically intended to impermissibly comment. It is only necessary to show that the testimony was "of such a character that the jury would naturally and necessarily" perceive it to be such a comment. *Samuels v. United States, supra,* at 968. However, it is reasonable to surmise that Bevis intended to draw attention to Petitioner's unwillingness to cooperate when defense counsel's incisive undermining of Bevis' investigative method and opinion is considered. Appendix P at 103a through 107a.

In short, Bevis' testimony falls within the constitutionally impermissible category, and it was not invited by Petitioner's counsel.

The trial judge attempted to remedy the constitutional violation with a curative instruction. But did this meet the prescription previously established by this Court?

In *Fahy v. State of Connecticut,* 84 S.Ct. 229, 375 U.S. 85 (1963), this Court considered the validity of a conviction where unconstitutionally obtained evidence was admitted during the trial. The Court stated:

> The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. Id. at 84 S.Ct. 230.

Using this test, the Court determined that the illegal evidence was prejudicial and, therefore, not harmless.

In *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824 (1967), this Court again faced the issue of whether a criminal conviction could stand when constitutional error had occurred during the trial. It was held that

> . . . before a federal constitutional error can be held harmless, the court must be able to declare a

> belief that it was harmless beyond a reasonable doubt. *Id.* at 386 U.S. 24, 87 S.Ct. 828.

There the Court noted that there was little, if any, difference between this holding and the test stated in *Fahy, supra.*

Under this rule the Court has established precedent affirming criminal convictions where the *untainted* evidence of guilt was so "overwhelming" that any constitutional error was harmless. *Harrington v. California,* 395 U.S. 250 (1969); *Milton v. Wainwright,* 407 U.S. 371, 92 S.Ct. 2174 (1972); *United States v. Hasting,* 461 U.S. 499, 103 S.Ct. 1974 (1983). As Judge Bownes wrote in *Clark v. Moran,* 942 F.2d 24 (1st Cir. 1991):

> In the practical application of this standard, courts have found error to be harmless when the untainted evidence, standing alone, provided "overwhelming evidence" of the defendant's guilt. *Id.* at 27.

In *Clark v. Moran, supra,* the court further pointed out that it was the duty of a reviewing court to consider the evidence as a whole, weighing the effect of tainted evidence against the effect of that evidence which was properly admitted. 942 F.2d 24 at 27.

That was the method of analysis correctly used by the First Circuit in *Coppola v. Powell,* 878 F.2d 1562 (1st Cir.), *cert. denied,* 110 S.Ct. 418 (1989). In *Coppola,* the court reviewed the untainted evidence and determined that it did not constitute overwhelming evidence of guilt, and that therefore the admission of the tainted evidence was not "harmless error beyond a reasonable doubt." *Id.* at 1571.

In this case, the refusal to grant a mistrial and the District Court of Appeal's affirmance of that refusal

conflict with the rule and standards set forth above. Moreover, it conflicts with the Florida Supreme Court's directives as to the application of the *Chapman* harmless error test. *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986) at 1138. Again, no direct review, discretionary or otherwise, by the Florida Supreme Court is available to Petitioner under the Florida Constitution.

As the courts found in *Coppola v. Powell, supra,* and *State v. DiGuilio, supra,* the error in this case is not "harmless" as defined by *Chapman* and its progeny. The evidence of Petitioner's guilt is anything but overwhelming.

Seven witnesses who had an opportunity to observe Petitioner after the accident indicated that they saw nothing that would indicate his impairment or intoxication. One of the seven was the medical technologist who took Petitioner's blood sample. *See* Statement of the Case.

Other than the blood alcohol test results and opinion testimony based on an incomplete, erroneous factual basis, the only evidence indicating Petitioner's impairment or having an illegal blood alcohol level is the testimony of Trooper Bevis that he "detected a slight unsteadiness on his feet" and that of both Bevis and Trooper Smith that they smelled alcohol on Petitioner's breath. Appendix P at 93a, 101a, 102a.

Moreover, the blood alcohol test itself is highly suspect. As previously related, there is a great discrepancy between Jean Bell's description of the tubes in which she put Petitioner's blood and the Florida Department of Law Enforcement witness' description of the tubes holding the blood which he analyzed. Appendix P at 94a, 95a, 120a.

Additionally, Trooper Bevis' opinion that the circumstances of the accident indicate Petitioner's impairment was severely undermined during his cross-examination when he admitted that he had not even considered the non-skid anti-locking brakes of Petitioner's vehicle. Appendix P at 104a, 105a. Nor had he considered that witnesses had seen Petitioner's vehicle stopped in the westbound lane at some distance short of where Petitioner finally parked it. And Trooper Bevis did not take into consideration the oncoming vehicle driven by Ms. Schulze, whom he had not questioned. Appendix P at 107a, 112a, 114a.

Moreover, although Bevis indicated that excessive speed was not a factor in the accident, the opinion of the State's expert, James D. Anderson, that Petitioner had sufficient time to avoid the accident was based partly on his opinion that Petitioner was exceeding the speed limit. Appendix P at 112a and 121a.

On the other hand, the opinion of the accident reconstruction specialist, Bobby Vincent Smith, was that Petitioner "reacted very fast to the situation and came to a stop prior to the body and pulled around". Appendix P at 122a. This opinion also took into consideration the oncoming lights and other factors revealed by the testimony but ignored by Trooper Bevis and Mr. Anderson.

When the accident occurred, Mr. and Mrs. Hawley were illegally on a dark roadway with their backs to the traffic. Mr. Hawley was in Petitioner's traffic lane, and his wife was holding his hand. Even Trooper Bevis was concerned about charging Petitioner under these circumstances. Appendix P at 103a.

Thus, it is clear that the evidence against the Petitioner in this case is marginal at best, and certainly not overwhelming.

It is also important that the jury's erroneous verdict of guilt as to Count Two (vehicular homicide through reckless driving) be considered. After the verdict, the trial judge granted a judgment of acquittal on this count. Petitioner's motion pointed out that there was *no* evidence of Petitioner's reckless operation of the vehicle. Appendix H at 20a.

Such a verdict in the absence of even a *prima facie* case is a strong indication that the jury was not impartial and fair in its analysis of the evidence. And it is reasonable to conclude that Trooper Bevis' testimony that Petitioner would not give him a statement about the circumstances of the accident helped to create that prejudice.

In summary, in light of the evidence and circumstances of this case, the State cannot meet the *Chapman* rule by showing that it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty in the absence of Bevis' impermissible comment on Petitioner's silence.

Thus, Petitioner's rights to due process of law and a fair and impartial trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution have been severely violated by the failure of the trial court to grant a mistrial after the Fifth Amendment violation.

The failure of the District Court of Appeal to express its reasons for deciding the important federal constitutional issues raised by Petitioner should not be allowed to bar review by this Court. This is especially true since the Florida Constitution precludes further direct state

appellate review of these federal issues. *Fla. Const.*, Art. V., Sec. 3.(b)(3).

Without review by this Court, these Florida constitutional strictures allow for State summary justice on federal constitutional issues without possibility of direct review. This in itself raises issues of fundamental fairness and due process of law under the Fourteenth Amendment. It is respectfully submitted that this is another reason for this Court's review of the proceedings below. Cf. Justice Black's opinion in *Chapman v. California*, 87 S.Ct. 824 (1967) at 826.

REQUEST FOR RELIEF

WHEREFORE, Petitioner requests that this Honorable Court grant the Writ of Certiorari, reverse the decisions of the District Court of Appeal, First District of Florida, and the trial court, and remand with appropriate instructions.

Respectfully submitted,

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November 30, 1992

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari to the District Court of Appeal, First District of Florida, have been mailed First Class, Postage Pre-paid, in accordance with Supreme Court Rule 29.3, to counsel for the Respondent, listed below, on this 30th day of November, 1992.

Wendy S. Morris, Assistant Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, Florida 32399-1050

BY:

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WILLIAM KEMPER JENNINGS